

FILED
Court of Appeals
Division II
State of Washington
12/12/2022 2:16 PM

NO. 57498-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Appellant,

v.

SEAN LEONARD,

Respondent.

Appeal from the Superior Court of Pierce County
The Honorable Jennifer Durcan Andrews

No. 21-1-00531-2

REPLY BRIEF

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Pierce County Prosecuting Attorney

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I. INTRODUCTION

This is a State's appeal from the trial court's imposition of an exceptional sentence of electronic home monitoring on a defendant who was convicted of a second degree assault. But because second degree assault is a "violent offense," electronic home monitoring is not available as a sentencing option.

The respondent, Sean Leonard, requests that this Court dismiss the State's appeal as moot because he has already served the ordered electronic home monitoring. Leonard, however, is barred from asserting mootness as a basis for resolving the appeal as he did not move to modify the commissioner's August 25, 2022, ruling denying his August 16, 2022, motion to dismiss this appeal as moot.

The unauthorized sentence of electronic home detention must be vacated, and this matter remanded for the imposition of a statutorily authorized sentence.

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II. FACTS RELEVANT TO MOOTNESS QUESTION

On August 16, 2022, Leonard filed a “Motion to Dismiss or Recharacterize.”¹ In the motion, Leonard asked that the State’s appeal be dismissed as moot on the grounds that he had completed the three-month term of electronic home monitoring. Motion to Dismiss at 1-2. The motion relied upon the case of *State v. Heng*, 22 Wn. App. 2d 717, 512 P.3d 942 (2022). *Id.* at 2.

Leonard’s motion to dismiss was denied by Commissioner Schmidt in an August 25, 2022, ruling.² Leonard did not file a RAP 17.7(a) motion to modify Commissioner Schmidt’s ruling.

On November 28, 2022, Leonard filed his brief of respondent. Leonard devotes one-half of the argument portion of his brief to a request to dismiss this appeal as moot. *See*

¹ A copy of this motion may be found in Appendix A.

² A copy of this ruling may be found in Appendix B.

Respondent's Brief at 4-8. He bases his motion to dismiss on *Heng*. Respondent's Brief at 4.

III. ARGUMENT

A. Leonard is Not Entitled to Further Review of the Mootness Question as a Matter of Right

Leonard filed a motion to dismiss as moot months before he filed his brief of respondent. Leonard did not file a motion to modify from the commissioner's adverse ruling. A commissioner's ruling becomes the final decision of this Court when an aggrieved person fails to seek modification of the ruling within the time permitted by RAP 17.7. *See, e.g., Hough v. Ballard*, 108 Wn. App. 272, 277, 31 P.3d 6 (2001). This Court should decline to revisit Leonard's claim that the State's appeal should be dismissed as moot.

B. A State's Appeal from an Unlawful Sentence is Not Rendered Moot by the Defendant's Service of the Unlawful Sentence

A State's appeal from an illegal sentence survives the defendant's service of his illegal sentence. This is because a

lawful sentence may still be imposed, and a defendant may be returned to custody to serve the same.

Since 1980 it has been settled that a trial court may resentence a defendant when the original sentence was erroneous. *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980). Increasing an unlawful or erroneously imposed mitigated sentence does not violate the double jeopardy clause in non-capital sentencing hearings. *Id.*; *State v. Hardesty*, 129 Wn. 2d 303, 310-12, 915 P.2d 1080 (1996); *State v. Pascal*, 108 Wn.2d 125, 131-135, 736 P.2d 1065 (1987). Increasing an unlawful sentence is allowed even after a defendant has been released from custody if the defendant contributed to the imposition of the unlawful sentence, the defendant receives credit for time already served, and the defendant was on notice that the sentence might be modified. *Hardesty*, 129 Wn.2d at 313-15; *State v. Murawski*, 142 Wn. App. 278, 289, 173 P.3d 994 (2007).

Leonard directly contributed to the unlawful electronic home detention sentence. He specifically requested the unlawful sentence in the trial court. CP 4; RP (April 22, 2022, excerpt) 5. Leonard has no expectation of finality in his illegal electronic home detention sentence because he is deemed to know the various statutory and court rule periods in which review of a sentence may be sought. *State v. Gonzalez*, 168 Wn.2d 256, 269, 226 P.3d 131 (2010); *Hardesty*, 129 Wn.2d at 315. The State had 30 days to file a notice of appeal from the denial of its timely motion for reconsideration of the unlawful sentence and did, in fact, file such a notice. CP 42; *Harris v. Charles*, 171 Wn.2d 455, 461-62, 256 P.3d 328 (2011). Leonard's improperly renewed motion to dismiss this appeal as moot must be denied.

Leonard, nonetheless, contends that this appeal should still be dismissed because "a remand for a new sentencing hearing would be fruitless." Respondent's Brief, at 5. He contends that the trial court will not impose a greater sentence. *Id.* Leonard's position is supported solely by cases in which the defendant was

the appellant, rather than the State. More importantly, this appeal is not about how much punishment Leonard merits—this appeal is about the correction of an erroneous and invalid sentence. *See generally State v. Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654 (1985).

C. An Exceptional Sentence May Not Include an Element that the Legislature Has Not Authorized for the Crime of Conviction

The State, relying upon the oft-cited decades old decision of *State v. Skillman*, 60 Wn. App. 837, 809 P.2d 756 (1991), requested that the sentence of electronic home monitoring be vacated and the matter remanded for entry of a lawful sentence. *See* Brief of Appellant at 4-6. Leonard’s response to the State’s argument does not distinguish *Skillman*, nor does it contend that *Skillman* was improperly decided. In fact, Leonard does not even acknowledge the existence of *Skillman*. Brief of Respondent at 8-11.

While an exceptional mitigated sentence allows the trial court to reduce the duration or length of a sentence, it does not

allow a court to include particular elements of a sentence that are not otherwise authorized for that crime. *Skillman*, 60 Wn. App. at 839, citing D. Boerner, *Sentencing in Washington*, § 9.22(a) (1985). Electronic home monitoring is not an authorized alternative to confinement under RCW 9.94A.734 for violent offenses. RCW 9.94A.734(1)(a). Assault in the second degree is a violent offense. RCW 9.94A.030(58)(a)(vii). The trial court's sentence of electronic home monitoring must be vacated, and the matter remanded for the trial court to impose a statutorily authorized exceptional mitigated sentence.

IV. CONCLUSION

The State respectfully requests that this court vacate the unauthorized term of electronic home monitoring and remand this matter to the trial court for resentencing.

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This document contains 1,085 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 12th day of
December, 2022.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ Pamela B. Loginsky
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Certificate of Service:

The undersigned certifies that on this day she delivered by E-file to the attorney of record for the respondent true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Gig Harbor, Washington on the date below.

12/12/2022
Date

s/ Kimberly Hale
Signature

APPENDIX A

No. 57498-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 2

State of Washington, Appellant

v.

Sean Leonard, Respondent

Motion to Dismiss or
Recharacterize

RAP 5.1; RAP 17.1

1. Identity of Moving Party

Sean Leonard, Appellant, requests the relief designated in
part 2.

2. Statement of Relief Sought

Sean Leonard asks that the Court of Appeals dismiss this
appeal as moot. In the alternative, Respondent asks the court to

*Motion to Dismiss or
Recharacterize - 1*

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recharacterize the State's Notice of Appeal as a Notice for Discretionary Review.

3. Facts Relevant to Motion

Following a conviction for second-degree assault, Sean Leonard was sentenced to a three-month term to be served on electronic home monitoring. The State appealed this sentence, even though the term is within the standard range for the offense. Mr. Leonard has since completed the three-month sentence.

4. Request for Relief and Argument

Mootness. A case is moot if a court can no longer provide effective relief. *State v. Heng*, --- Wn. App. 2d ---, ___, 512 P.3d 942 (2022). The State's appeal in this case is moot.

Appellant seeks review of an order permitting Mr. Leonard to serve his standard range three-month sentence on

*Motion to Dismiss or
Recharacterize - 2*

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electronic home monitoring. CP 19-38. Mr. Leonard has already served his sentence. Accordingly, the case is moot. The Court of Appeals should dismiss review.

Recharacterization as discretionary review. The Rules of Appellate Procedure limit the types of decisions subject to direct appeal. RAP 2.2. The State may only appeal from a sentence in a criminal case that “(A) is outside the standard range for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.” RAP 2.2(b)(6).

The sentence here is within Mr. Leonard’s standard range. CP 24, 25. There does not appear to be any dispute that Mr. Leonard’s range is 3-9 months. CP 24. The State cannot show that Mr. Leonard’s sentence is “unauthorized by law,” given the

*Motion to Dismiss or
Recharacterize - 3*

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sentencing court's authority to impose a sentence that does not include any confinement. CP 18. The Judgment and Sentence does not omit any provisions required by law. CP 3-16.

The State's appeal does not fall within RAP 2.2(b).

A notice of appeal of a decision that is not appealable "will be given the same effect as a notice for discretionary review." RAP 5.1(c). The notice here is directed toward a decision that is not appealable. It should be recharacterized as a notice for discretionary review. RAP 5.1(c)

The Court of Appeals should dismiss this appeal as moot. In the alternative, the court should recharacterize the State's notice as a notice for discretionary review.

DECLARATION OF COUNSEL

Jodi R. Backlund declares as follows:

*Motion to Dismiss or
Recharacterize - 4*

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1. Our office was appointed to represent Mr. Leonard in this matter.
2. I have reviewed the clerk's papers. They reflect that the State is seeking review of the trial court's decision to allow Mr. Leonard to serve his three months confinement on Electronic Home Monitoring.
3. I have contacted trial counsel and Mr. Leonard. I have confirmed that Mr. Leonard has completed his three-month term. Proof is attached.

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 497 words, as calculated by our word processing software.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed on August 16, 2022 in Olympia, Washington.

BACKLUND & MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for Appellant

*Motion to Dismiss or
Recharacterize - 5*

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ID8695674

Sentinel Offender Services - PIERCE COUNTY DISTRICT COURT
Electronic Monitoring Program
Completion Notice

Name: Sean Leonard

Agency/Judge:

Inmate/Case Number: 21-1-00531-2

Court: Superior Court of Washington

Offense: Assault 2nd Degree

DOB: 2/26/1968

Enrollment Date: 2022-05-04

Client Number: ID8695674

Exp. Completion Date: 2022-08-03

Area Office:

No. of Days Ordered: 92

Officer/PO: MADISON HANSEN

Other EM Numbers and Cases:

- ☐ ALL APPLICABLE PROGRAM FEES HAVE BEEN PAID IN FULL
- ☐ REQUIRED DRUG/ALCOHOL TESTING COMPLETED
- ☐ COMMUNITY SERVICE HOURS WERE COMPLETED
- ☒ ALL ELECTRONIC MONITORING EQUIPMENT HAS BEEN RETURNED
- ☒ ALL CONDITIONS REQUIRED BY THE REFERRING AGENCY HAVE BEEN MET

Comment:

The above named defendant completed 92 days of house arrest via RF Patrol. There were zero violations during his participation. All equipment was returned in good and working condition.

Submitted By: MADISON HANSEN

Case Manager: MADISON HANSEN

Sentinel Offender Services

Signature: 

930 TACOMA AVENUE SOUTH
ROOM 106
TACOMA, WA 98402

Date: 8/3/2022 4:11:41 PM

Phone: 253-591-5357 X6139

Fax: 253-591-2016

ID8695674

COMPLETION

BACKLUND & MISTRY

August 16, 2022 - 8:27 AM

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Motion to Dismiss or Recharacterize as Discretionary Review

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APPENDIX B



Washington State Court of Appeals

Division Two

909 A Street, Suite 200, Tacoma, Washington 98402

Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> **OFFICE HOURS:** 9-12, 1-4.

August 25, 2022

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CASE #: 57498-5-II/State of Washington, Appellant v. Sean Leonard, Respondent

Court Reporter & Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The motion to dismiss or recharacterize the State's appeal is denied.

Very truly yours,

A handwritten signature in black ink, appearing to be "Derek M. Byrne", with a long horizontal flourish extending to the right.

Derek M. Byrne
Court Clerk

PIERCE COUNTY PROSECUTING ATTORNEY

December 12, 2022 - 2:16 PM

Transmittal Information

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